

**Lincoln Hills Nursing Home, Inc. and James Tindall, Case 25-CA-13954**

21 February 1984

**DECISION AND ORDER**

BY CHAIRMAN DOTSON AND MEMBERS  
ZIMMERMAN AND HUNTER

On 17 January 1983 Administrative Law Judge Lowell Goerlich issued the attached decision. The Respondent filed exceptions and a supporting brief,<sup>1</sup> and the General Counsel filed cross-exceptions, a supporting brief, and a brief in answer to Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions and to adopt the recommended Order as modified.<sup>3</sup>

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Lincoln Hills Nursing Home, Inc., Tell City, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(c).

"(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the attached notice for that of the administrative law judge.

<sup>1</sup> The Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

<sup>2</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>3</sup> The General Counsel has excepted to the judge's imposition of a narrow cease-and-desist order in view of the nature of the 8(a)(4) violation found herein and the Respondent's proclivity to commit unfair labor practices. We find merit in the General Counsel's exception and shall, for the reasons set forth in *Lincoln Hills Nursing Home*, 257 NLRB 1145 (1981), and 266 NLRB 740 (1983), provide a broad remedial order against Respondent.

Chairman Dotson did not participate in the earlier decision and does not agree with the broad order here.

**APPENDIX**

**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government**

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discriminatorily continue to transfer work out of the maintenance department in order to avoid returning to employment union partisans or persons who testify under the protection of Section 8(a)(4) of the National Labor Relations Act, as amended.

WE WILL NOT lay off or discharge employees for testifying under the protection of Section 8(a)(4) of the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed by Section 7 of the National Labor Relations Act to engage in self-organization, to bargain collectively through a representative of their own choosing, to act together for collective bargaining or other mutual aid or protection, or to refrain from any and all these things.

WE WILL offer James Tindall immediate employment and, if his previous job is no longer available, to a substantially equivalent position, and compensate him for any wages lost by reason of our discrimination against him, with interest.

WE WILL expunge from our files any reference to the unlawful layoff of James Tindall and inform him, in writing, that this has been done and that evidence of this unlawful layoff will not be used as a basis for future personnel actions against him.

WE WILL restore the status quo ante in the maintenance department as it existed prior to the strike on 29 April 1977 by returning to the department work transferred out of the department to the janitor, housekeeping employees, and other employees and WE WILL reinstitute our practice in respect to contracting out work as it existed prior to the strike on 29 April 1977 in the maintenance department.

**LINCOLN HILLS NURSING HOME, INC.**

**DECISION**

**STATEMENT OF THE CASE**

LOWELL GOERLICH, Administrative Law Judge: The original charge in this case filed by James Tindall, an individual, on September 28, 1981, was served on Lincoln

Hills Nursing Home, Inc.<sup>1</sup> (the Respondent), by certified mail about September 29, 1981. A complaint and notice of hearing was issued on June 30, 1982. In the complaint it is alleged that the Respondent laid off James Tindall and has refused to recall him because he testified at a Board hearing in Cases 25-CA-11841, 25-CA-12536, and 25-CA-12578, all in violation of Section 8(a)(1) and (4) of the National Labor Relations Act, as amended (the Act).

The matter came on for hearing on September 21, 22, and 23 in Owensboro, Kentucky, and on October 13 and 14 in Tell City, Indiana. Each party was afforded a full opportunity to be heard, to call, to examine and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions of law, and to file briefs. All briefs have been carefully considered.

Upon the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

#### FINDINGS OF FACT, CONCLUSIONS, AND REASONS THEREFOR

##### I. THE BUSINESS OF THE RESPONDENT

The Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Indiana.

At all times material herein, the Respondent, a corporation, with an office and place of business in Tell City, Indiana (the Respondent's facility) has been engaged as a health care institution in the operation of a nursing home providing inpatient medical and professional care services for the elderly and the mentally handicapped.

During the 12-month period ending June 30, 1982, the Respondent, in the course and conduct of its business operations described above, derived gross revenues in excess of \$100,000.

During the 12-month period ending June 30, 1982, the Respondent, in the course and conduct of its business operations described above, purchased and received at its Tell City, Indiana facility products, goods, and materials valued in excess of \$50,000 directly from points outside the State of Indiana.

The Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

##### II. THE LABOR ORGANIZATION INVOLVED

Chauffeurs, Teamsters and Helpers Local Union No. 215, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union) is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

<sup>1</sup> The name of the Respondent appears as amended at the hearing.

##### III. THE UNFAIR LABOR PRACTICES

The Board certified the Union as the exclusive bargaining agent for the Respondent's service and maintenance employees on November 21, 1976. Thereafter on January 4, 1977, the Respondent and the Union commenced contract negotiations. On April 29, 1977, a strike was engaged which concluded on July 29, 1977. At the time of the strike Ralph Alvey<sup>2</sup> and Norman Holpp were the employees in the Respondent's maintenance department. Both were strikers. Tindall was hired in the maintenance department on May 2, 1977, and crossed over the picket line. Thereafter Mike Chenault was hired on May 4, 1977, as a second maintenance man in the maintenance department and he likewise crossed over the picket line. Chenault was laid off on March 22, 1978, at which time Roger Ambrose, administrator of Lincoln Hills Nursing Home, Inc., advised Tindall that he was "going to try to make it with one maintenance man."<sup>3</sup> Thereafter when Tindall asked Ambrose for help, he "kept putting [Tindall] off." Tindall continued his request and finally on March 14, 1979, Alvey began to work part time as the second maintenance man. On November 27, 1979, the Respondent hired Wayne Carwile as a janitor. This position had not existed before Carwile's hiring. Complaints in Cases 25-CA-11841, 25-CA-12536, and 25-CA-12578 were filed on July 10, September 4, and October 23, 1980. Thereafter on September 2, 1980, Tindall was injured on the job and went on medical leave. He was not replaced. Alvey became the sole full-time maintenance man. Carwile continued as janitor. Contracting out was utilized and other employees also performed some of the maintenance department tasks.

The unfair labor practice charges in Cases 25-CA-11841, 25-CA-12536, and 25-CA-12578 came on for hearing January 13, 14, and 15; March 3, 4, and 5; and April 21, 22, and 23, 1981. Tindall testified as a witness called by the General Counsel on March 3 and 4, 1981. Administrative Law Judge Wagman, describing Tindall's testimony in an unpublished Decision issued on June 9, 1982, stated:

Tindall testified on direct examination that when he requested Alvey's recall, Ambrose responded in substance that he would not call Alvey back because of his involvement with the Union and that he, Ambrose, would rather contract the maintenance out than recall Alvey. Tindall also testified about conversations he had during the strike in April or May 1977, in which Ambrose complained of his treatment of Alvey at the negotiating table.

Administrative Law Judge Wagman held that because of his union activities Alvey was in "disfavor with the Respondent." He further found:

<sup>2</sup> Alvey was hired on September 24, 1973.

<sup>3</sup> Ambrose's correspondence (March 7, 1978) with Dr. Fred Smith whose opinion he sought indicated that the purpose of eliminating a maintenance man was economic.

The warning addressed to Tindall upon Alvey's reinstatement as a part-time employee strongly suggested the motivation for Ambrose's subsequent decision to transfer a significant part of what would otherwise be Alvey's work to the housekeeping department and then hire a new full-time employee, Wayne Carwile, to do it. In light of Ambrose's willingness on prior occasions to engage in unlawful discrimination to avoid reinstating economic strikers, I find it likely that the transfer of work and Carwile's hire reflected Ambrose's design to bar Alvey from full-time status and thus limit his union activity.

I find here, contrary to Respondent's position that in November 1979, Ambrose assigned a substantial portion of the maintenance department's work to Wayne Carwile, a newly hired employee, who had not participated in the strike. In remarks to Tindall, Ambrose admitted that he was hiring Carwile in response to Tindall's repeated complaints that he was unable to keep up with the maintenance work by himself. However, instead of classifying Carwile as a maintenance employee, Ambrose hired him as a housekeeping employee and transferred the maintenance work to him. From these circumstances, I find that the workload in the maintenance department in November 1979 was sufficient to provide Alvey with full-time employment.

Respondent's efforts to supply an economic excuse for Ambrose's treatment of Alvey is unsupported by the record. Ambrose's repeated testimony that it was less expensive for Respondent to assign former maintenance tasks to Carwile than it was to permit maintenance employees to accomplish such tasks is unsupported by any factual data. Respondent failed to show a comparison between the labor cost due to Carwile's employment and the cost which would have resulted if Alvey's workweek had expanded to 5 days. Indeed, my calculations reflected that Carwile's 40-hour week was more expensive than providing Alvey with 3 additional 8-hour days. In sum, I find it hard to believe that Respondent was able to save money by retaining Alvey in his 2 to 2 1/2-day schedule and expanding the housekeeping staff by adding an entirely new employee who worked a full 40-hour week at an hourly wage that was \$1 less than Alvey's.

In sum, I find that the Respondent has failed to rebut the General Counsel's showing that Ambrose was motivated by union animus when he hired Wayne Carwile and thus rejected Ralph Alvey as a full-time maintenance employee in November 1979. Accordingly, I find that by this discrimination, Respondent violated Section 8(a)(3) and (1) of the Act.

The General Counsel and the Respondent offered evidence covering the same subjects included in Administrative Law Judge Wagman's findings. Such evidence demonstrates that the situation as it was observed by Ad-

ministrative Law Judge Wagman has continued at least to the time of the instant hearing. The Respondent has not rectified its unfair labor practices and still presses its position taken before Administrative Law Judge Wagman. Carwile continues to perform the maintenance work noticed by Administrative Law Judge Wagman, and other employees as well as contractors are performing maintenance work which fell within the job requirements of Alvey and Holpp before the strike. Hence the Respondent continues its discriminatory tactics which have resulted in the denial of a second employee in the maintenance department. Such conclusions must follow from Administrative Law Judge Wagman's findings, and the record before me. In this respect, on the basis of the record before me, I find no reason to disturb those findings or to depart from them.

Prior to Tindall's testimony in the above-mentioned unfair labor practice cases Tindall testified that Ambrose phoned him sometime in December 1980 and "wanted to know when [Tindall] would return to work." Tindall replied that he "had no idea [since he] was still under the doctor's care"; to which Ambrose responded that Tindall "was needed, that there was work to be done. And that the sooner [he] got back the better." About 2 weeks before the hearing Ambrose telephoned Tindall again. In this conversation, according to Tindall, Ambrose asked Tindall "how [he] was doing" and "wanted to know when [he] was going to return to work." Ambrose said that "the work was there and needed to be done and for [Tindall] to get back as quick as he could." Ambrose denied that he had uttered the foregoing remarks but admitted the phone conversations which he said concerned Tindall's workmen's compensation claim. The adjuster had been attempting to contact Tindall.<sup>4</sup> After Tindall testified in the unfair labor practice case Ambrose did not phone him again about returning to work.

While Ambrose denied that he had encouraged the return of Tindall to employment, he testified that at the time of the hearing in which Tindall testified he had intended to give Tindall work in the maintenance department. Ambrose testified:

Q. At the time of the last hearing Mr. Alvey was in Mr. Tindall's position and was replacing Mr. Tindall while he was on sick leave, correct?

A. Right.

Q. And Mr. Tindall was due to return from sick leave at any time, is that correct? It was indefinite when he was going to return, correct?

A. We didn't know when he was going to return.

Q. You didn't know but you expected him to return at some time, did you not?

A. Well I expected him to, yes. But we didn't know when.

Q. But you expected him to?

A. Yes.

<sup>4</sup> In regard to these conversations I have credited Tindall. At the time of these conversations Ambrose had reason not to want to antagonize Tindall, a potential witness in the upcoming unfair labor practice proceedings, and by returning Tindall to employment Ambrose could have (had he insisted on one maintenance man) laid off Alvey, whom the Respondent looked upon with disfavor. Demeanor has been considered.

Q. And when he returned it was your intention, at the time of the last hearing, to return Mr. Alvey to his part time position and put Mr. Tindall back into his original position, is that correct?

A. At that time I would say so.

JUDGE GOERLICH: What caused you to change your mind?

THE WITNESS: Well the fact that we are talking about January of 81—

MR. OVERSTREET: March of 81.

THE WITNESS: The fact Your Honor, that we had went that long with one maintenance man pretty well proved the fact that we could make it with one maintenance man.

Also at the time of the above-mentioned hearing Ambrose testified that he was trying to protect Tindall's job. Ambrose testified:

Q. Yes. But you told Tindall that you were trying to protect his job?

A. That's right.

Q. And the job that you were referring to was it the maintenance position?

A. That's correct.

Q. And that was—and you felt that that was Tindall's job, is that correct?

A. That's correct.

Q. That's what you were trying to protect?

A. That's right.

A. If Ralph Alvey were to leave today I would offer Jim Tindall a job.

Thereafter on Friday, August 27, 1981, Tindall phoned Ambrose and advised him that his doctor had released him for work. Ambrose instructed Tindall to report for work on Monday, August 31, 1981, unless he was advised to the contrary. Tindall appeared as instructed on Monday and commenced work in the maintenance department where he worked until around 3 p.m. when he and Alvey were called to a meeting by Ambrose. Ambrose opened a discussion as to "why he should keep on two maintenance men." Alvey and Tindall advanced reasons in favor of keeping two maintenance men. Ambrose disagreed and felt that he should keep Alvey because he was the senior person. Ambrose suggested that Alvey and Tindall make the choice; they declined. Ambrose then chose Alvey and laid off Tindall.

According to Ambrose he allowed Tindall to return to work because at the time he had not conferred with counsel and he wanted to handle the matter correctly. After Ambrose conferred with counsel he took the action above described.<sup>6</sup>

After Tindall filed the unfair labor practice charges in this case he and Ambrose conversed on several occasions. In one of these conversations Ambrose said something to the effect: "It's very hard for me to forget what you [Tindall] said on the witness stand."

<sup>6</sup> According to Ambrose he chose Alvey, "First, I felt that Mr. Alvey was the better maintenance man. Second, seniority. Third, it might have cut off any potential backpay from any of the other hearings we had."

While the Respondent was cool toward Tindall because of his testimony which disclosed the Respondent's discriminatory treatment of union partisan Alvey, and looked upon Tindall with disfavor for testifying, a factor which no doubt strengthened its resolution to lay him off, nevertheless, the Respondent's action in this regard was also the proximate result of its insistence on continuing its discriminatory transfer of work from the maintenance department, an unfair labor practice which Administrative Law Judge Wagman found. Thus it is clear that Tindall also became the butt of the Respondent's unlawful discrimination. Had the status quo ante been in effect as it existed prior to the strike Tindall would have been employed because Ambrose indicated that if a job had been available in the maintenance department Tindall would have been allowed the job. Moreover, under the circumstances it is also apparent that Tindall would have, except for his unfavorable testimony, replaced Alvey since, as noted by Administrative Law Judge Wagman, Alvey was in "disfavor with Ambrose" because of his union partisanship and, as this record discloses, Ambrose had intended to return Tindall to employment prior to his testimony. Accordingly, based on the findings of Administrative Law Judge Wagman and the record before me I find that by laying off James Tindall on August 31, 1981, the Respondent violated Section 8(a)(1), (3), and (4)<sup>6</sup> of the Act.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the policies of the Act for jurisdiction to be exercised herein.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By unlawfully laying off James Tindall on August 31, 1981, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (4) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

It having been found that the Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

It having been further found that the Respondent laid off James Tindall on August 31, 1981, it is recommended that the Respondent immediately offer him employment in the maintenance department if the same is not inconsistent with the status quo ante in the maintenance department as it existed prior to the strike of April 29, 1977. In this regard it is further recommended that the

<sup>6</sup> In reaching this decision I have not been unmindful of and have followed the teachings of *Wright Line*, 251 NLRB 1083 (1980). The Respondent has not rebutted the General Counsel's prima facie case by showing that it would have laid off James Tindall even if he had not testified at the Board hearing.

status quo ante be reinstated and the work which was then being assigned to the maintenance department be restored to the maintenance department, including the work transferred to the janitor, the housekeeping employees, and any other employees of the Respondent, and that the Respondent's practice in respect to contracting out work be reinstated as it was prior to the strike. Since it is further apparent that had the Respondent discontinued its unlawful acts which resulted in the layoff of Tindall, his employment would have continued as of August 31, 1981, it is recommended that Tindall be made whole for any loss of earnings he may have incurred by reason of the Respondent's discrimination against him by payment to him of a sum of money equal to the amounts he would have earned from the date of his unlawful layoff to the date of a lawful offer of employment,<sup>7</sup> less net earnings during such period, with interest thereon, to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).<sup>8</sup>

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I hereby issue the following recommended

#### ORDER<sup>9</sup>

The Respondent, Lincoln Hills Nursing Home, Inc., Tell City, Indiana, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Discriminatorily continuing to transfer work out of the maintenance department in order to avoid returning union partisans or persons whose testimony is protected under Section 8(a)(4) of the Act from obtaining employment.

(b) Laying off or discharging employees for testifying under the protection of Section 8(a)(4) of the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining

<sup>7</sup> It may be that exstriker Norman Holpp is entitled to the job. *Laidlaw Corp. v. NLRB*, 414 F.2d 99 (7th Cir. 1969); *Randall v. NLRB*, 687 F.2d 1240 (8th Cir. 1982). This matter is left to the compliance stage of this proceeding.

<sup>8</sup> See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).

<sup>9</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) In conformity with the remedy above set out offer James Tindall immediate employment, if his previous job is no longer available, to a substantially equivalent position and make him whole for any loss of wages he may have suffered by reason of the Respondent's unlawful act, plus interest.

(b) Expunge from its files any reference to the unlawful layoff of James Tindall and inform him, in writing, that this has been done and that evidence of this unlawful layoff will not be used as a basis for future personnel actions against him.

(c) Restore the status quo ante in the maintenance department as it existed prior to the strike on April 29, 1977, by returning to the department work transferred out of the department to the janitor, housekeeping employees, and other employees and reinstituting the practice in respect to contracting out as it existed prior to April 29, 1977, in the maintenance department.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facility in Tell City, Indiana, copies of the attached notice marked "Appendix."<sup>10</sup> Copies of said notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the complaint allegations which are not the subject of specific findings herein be dismissed.<sup>11</sup>

<sup>10</sup> If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>11</sup> In drawing this decision the entire record has been considered. Nothing has been pretermitted.